BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HEIDI NOEL POTTS	)	
Claimant	)	
	)	
VS.	)	
	)	
VIEGA, LLC	)	
Respondent	)	Docket No. 1,042,978
	)	
AND	)	
	)	
TWIN CITY FIRE INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Bretz Law Offices LLC (Bretz) requested review of the July 22, 2011, Order Apportioning Attorneys Fees entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on November 18, 2011. The Director appointed E. L. Lee Kinch to serve as Appeals Board Members Pro Tem in place of former Board Member Julie A.N. Sample and Joseph Seiwert to serve in place of current Board Member Tom Arnhold, who recused himself from this matter.[1] Matthew L. Bretz, of Hutchinson, Kansas, appeared for appellant Bretz. Mitchell W. Rice, of Hutchinson, Kansas, appeared for Mann Law Offices L.L.C. (Mann). Timothy Emerson, of Overland Park, Kansas, who represents respondent and its insurance carrier, did not file a brief or participate in oral arguments.

The Administrative Law Judge (ALJ) allocated one-third of the attorney fees to Mann and two-thirds of the attorney fees to Bretz, along with its expenses. Bretz was also ordered to reimburse Mann for the cost of copying Heidi Potts' file.

[1] As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Kinch will continue to serve as a Board Member Pro Tem in this case.

ISSUES

Bretz requests review of the ALJ's finding that it was only entitled to two-thirds of the attorney fees generated in the workers compensation claim of Heidi Potts. Bretz argues that substantially all of the work involved in Ms. Potts claim was performed while she was being represented by the Bretz firm and the Bretz firm represented Ms. Potts for a substantially longer period of time than did Mann. It asks the Board to award it at least 95 percent of the attorney fees in this case, as well as its expenses. Bretz also argues that it should not be limited to fees based solely on *quantum meruit* because it was discharged without cause. In the event the Board finds Bretz is limited to fees based on *quantum meruit*, it should not be calculated solely on number of hours worked multiplied by a reasonable rate.

Mann argues the Board should determine the value of Bretz' lien on the attorney fees based upon *quantum meruit*. Mann also asks that the Board affirm the ALJ's order giving it a credit of $107.25 for expenses in getting a copy of Ms. Potts case file from Bretz.

The issues for the Board's review are:

(1) How should the attorney fees in this case be divided between Bretz and Mann?

(2) Should Bretz reimburse Mann for the costs of photocopying claimant's file?

FINDINGS OF FACT

On November 5, 2008, Ms. Potts signed an attorney fee contract with Bretz, hiring Bretz to represent her in a workers compensation claim. The case was handled for Bretz by Mitchell Rice, who at the time was an associate in the Bretz law firm. During the time of Bretz' representation, Ms. Potts was examined by Dr. Pedro Murati, and Dr. Murati's deposition was taken. She was also interviewed by Robert Barnett, Ph.D., and Dr. Barnett's deposition was also taken. Claimant's testimony was taken by deposition in October 2010, and a Regular Hearing was held on January 11, 2011. Bretz, in its brief to the Board, contends a $25,000 settlement offer was obtained from respondent on February 8, 2010, but there is nothing in the record about a settlement offer other than a notation by the ALJ on the Pretrial Stipulations dated October 14, 2010, that respondent had made an offer of $17,860.

On March 15, 2011, Mr. Rice's employment with Bretz was terminated. On March 21, 2011, Mr. Rice wrote Ms. Potts and informed her he was no longer employed by Bretz and advising her she would need to choose whether to let him continue to represent her or remain with Bretz. Shortly thereafter, Mr. Rice became associated with the firm of Mann, and on April 29, 2011, Ms. Potts signed a contract employing the Mann firm to represent her interests in the workers compensation claim. Bretz filed a Notice of

Attorney Fee Lien claiming a 25 percent attorney fee lien upon all compensation made in Ms. Potts' workers compensation claim.

Mr. Rice requested Ms. Potts' workers compensation file. He received it only after paying Bretz a copying fee of $107.25.

Mr. Rice, on behalf of the Mann firm, negotiated a settlement in Ms. Potts' claim. The claim was eventually settled on the same day Ms. Potts signed the attorney fee contract with Mann, and the settlement was in the amount of $60,000. A Settlement Hearing was held on May 17, 2011, approving the settlement. The attorney fees on the settlement were $15,000. Because of the Bretz lien, the amount of $20,000 was withheld from the settlement to cover attorney fees and expenses. Ms. Potts was issued a check in the amount of $40,000.

Because Bretz was handling Ms. Potts' claim on a contingency fee basis, no record was kept of the amount of time it spent on the claim. After Mr. Rice left the firm, Bretz prepared an itemization which estimated the amount of time spent by Mr. Rice and others who had worked on Ms. Potts' claim during the time the Bretz firm represented her. That itemization shows the Bretz firm spent approximately 78.17 hours working on Ms. Potts' claim from November 5, 2008, through July 19, 2011. Bretz noted it had represented Ms. Potts for 870 days. Bretz also provided the court with a list of expenses in the amount of $2,063.27 incurred during its representation of Ms. Potts. Ms. Potts expressed her intent to hire Mr. Rice on March 25, 2011, and she signed an attorney fee contract with Mann on April 29, 2011.

Mr. Rice disputes the amount of time Bretz estimates was spent on Ms. Potts' claim. He signed an affidavit on August 9, 2011, stating his best estimate was that he spent 40 hours on Ms. Potts' claim while working at Bretz. The affidavit indicates he spent 32 hours working on Ms. Potts' claim after leaving Bretz.

In its Order Apportioning Attorney Fees, the ALJ found Bretz was entitled to its expenses and two-thirds of the attorney fees, but was to reimburse Mann the amount of $107.25 for the cost of copying Ms. Potts' file. Respondent was directed to issue a check to Ms. Potts in the amount of $2,936.73 ($5,000 less Bretz' expenses of $2,063.27); a check to Mann in the amount of $5,107.25 (1/3 of the attorney fee plus $107.25 reimbursement for the copying fee); and a check to Bretz in the amount of $11,956.02 (2/3 of the attorney fee plus expenses of $2,063.27 less $107.25 for copying fee).

PRINCIPLES OF LAW

The attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the

disability compensation recovered.[2] Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.[3]

The Workers Compensation Act provides that all disputes regarding attorney fees shall be decided by the administrative law judges.[4] The division of attorney fees should be considered on a case-by-case basis after considering all relevant factors. Some of those factors are listed in K.S.A. 44-536(b), which specifically includes:

> (1) The written offers of settlement received by the employee prior to execution of a written contract between the employee and the attorney . . .
> (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
> (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
> (4) the fee customarily charged in the locality for similar legal services;
> (5) the amount of compensation involved and the results obtained;
> (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
> (7) the nature and length of the professional relationship with the employee or the employee's dependents; and[5]
> (8) the experience, reputation and ability of the attorney or attorneys performing the services.

Additionally, the Court of Appeals has held that when resolving attorney fee disputes, the director of workers compensation has the power and discretion to apportion fees. But the director must act reasonably, considering the circumstances of each case.

> When resolving disputes under K.S.A. 44-536(h), the director of workers' compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case.[6]

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[2] See K.S.A. 44-536(a).

[3] See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

[4] K.S.A. 44-536(h).

[5] See Kansas Rules of Professional Conduct (KRPC) 1.5 (Fees) (2010 Kan. Ct. R. Annot. 458).

[6] *Madison v. Goodyear Tire & Rubber Co.,* 8 Kan. App. 2d 575, Syl. ¶ 5, 663 P.2d 663 (1983).

In *Madison*,[7] the Kansas Court of Appeals ruled that attorneys who are discharged before the contingency provided in a contingency fee contract may not, generally, recover the contingency fee. Instead, the fees are to be determined based upon the reasonable value of the services the attorney has rendered, or under *quantum meruit*. And in that same opinion, the Kansas Court of Appeals cited both *In re Phelps*[8] and *Shouse v. Consolidated Flour Mills Co.*[9] as establishing a similar rule when attorneys are discharged before completing the contracted services for stipulated attorney fees.

KRPC 1.6(d) (2010 Kan. Ct. R. Annot. 522) states:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

The Kansas Bar Association (KBA) Legal Ethics Opinion No. 92-5 (July 30, 1992) states in part: "The purpose of [ABA Model Rules of Professional Conduct (MRPC)] 1.16(d) is protection of the client's interests, and the attorney's interests are incidental thereto."

The ABA Model Rules of Prof'l Conduct (2011 Annot.) R. 1.16 states:

> Upon termination of representation, the lawyer has a duty to surrender promptly papers and other property to which the client is entitled. . . . In general, if a lawyer wishes to keep a copy of a client's file, the lawyer must assume the costs of copying documents generated or paid for by the client, although delivery and assemblage costs can normally be charged to the client.

KBA Legal Ethics Opinion No. 92-5 further states:

> "Client's property" under MRPC 1.16(d) means counsel may charge a reasonable photocopy fee on that portion of a file which does not constitute "client's property," and which is requested to be photocopied by the client. "Client's property" includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings

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[7] *Madison*, 8 Kan. App. 2d at 579. See also *Shamberg, Johnson & Bergman, Ctd. v. Oliver*, 289 Kan. 891, 904, 909, 220 P.3d 333 (2009).

[8] *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970).

[9] *Shouse v. Consolidated Flour Mills Co.*, 132 Kan. 108, 294 Pac. 657 (1931).

> and other court papers and such other documents as are necessary to understand and interpret documents highlighted above. Such documents, being "client property" must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of "client property" may be copied at a reasonable expense to the client such "expense" to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.

CONCLUSION

The parties have argued several different approaches to apportioning the attorney fees. These range from awarding 100 percent of the fees to Bretz to awarding 100 percent to Mann, as well as several divisions within those two extremes. Under circumstances such as this, the Board generally approaches the division of fees on the basis of *quantum meruit*, looking at the factors enumerated in the statute and KRPC and, in particular, the time spent by the attorneys respectively. However, in this case, there is a marked difference of opinion concerning the accuracy of the itemizations of time submitted by the other attorney. The ALJ reasoned:

> Under all of the circumstances, it does not appear that either of the approaches suggested by Bretz or Rice gives an adequate or equitable formula for division of the attorneys fees. The court will allocate attorneys fees 1/3 to Rice, and 2/3 to Bretz. Bretz will also reimburse Rice for the cost of copying Potts' file. The file was Potts', and Bretz's interests were protected by its lien. By virtue of that lien, Bretz no longer had a right to retain Potts' file. If Bretz wanted to retain a copy of the file, it should bear the expense of making that copy, not Potts, and not Rice.[10]

The Board finds that the ALJ's apportionment of the attorney fees is reasonable and should be affirmed.

Some commentators draw a distinction between the client's property, which must be returned to the client without charge, and work product of the attorney, for which a reasonable expense may be charged for photocopying.[11] In this case, however, no such distinction has been made and no itemization was provided whereby the Board could determine what charges were for copying client property versus what may be attorney work product. Accordingly, the Board finds that Bretz should reimburse Mann for the cost of photocopying Potts' file.

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[10] ALJ Order Apportioning Attorneys Fees (July 22, 2011), at 3.

[11] See KBA Legal Ethics Opinion 92-5; Peter H. Geraghty, Whose File Is It Anyway?, ABA E-news for Members September 2006.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order Apportioning Attorneys Fees of Administrative Law Judge Bruce E. Moore dated July 22, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Melinda G. Young/Matthew Bretz, Attorneys for Bretz Law Offices, LLC
Mitchell W. Rice, Attorney for Mann Law Offices
Timothy Emerson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge